Perwira Habib Bank Malaysia v Lum Choon Realty Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL NO D4–23–4260 OF 1986
ABDUL WAHAB PATAIL J
23 JANUARY 2007

Contract — Guarantee — Guarantee for loan facility — Whether guarantor still liable when original facility to which he guaranteed was converted from term loan to overdraft without his consent — Section 86 Contracts Act 1950

Contract — Guarantee — Liability of guarantor — Whether defendant liable under prior and subsequent letters of guarantee if subsequent letter of guarantee issued after conversion of original facility upon his request — Whether defendant estopped from denying his liability

Banking Law — Banker and customer — Interest — Whether bank could vary interest rate when agreement provides for the bank to do so

Banking Law — Letter of offer — More new terms found in subsequent written agreements and guarantees — Whether acceptance of letter of offer prevented one party proposing new terms for the other to accept in subsequent agreement or guarantee

Civil Procedure — Stay of execution — Special circumstances — Whether proceeding before registrar for assessment of damages in a substantial claim against plaintiff was special circumstances

By this action, the plaintiff is seeking judgment: (a) as against the first defendant, the sum of RM47,884,178.68 due and owing to the plaintiff as at 26 November 1986 together with interest until full payment; (b) as against the second and third defendants, as guarantors under the first letter of guarantee the sum of RM14,149,979.35 due and owing to the plaintiff as at 26 November 1986 together with interest until full payment; and (c) as against the third and fourth defendants, respectively, as guarantors under the second letter of guarantee the sum of RM33,734,199.33 being the outstanding sum due and owing to the plaintiff under the second bank guarantee facility as at 26 November 1986 together with interest until full payment.

The facilities were initially a term loan of RM10m at the rate of 15.5% per annum for 2 1/2 years from the date of drawdown inclusive of two years' grace period in repayment of the principal. The plaintiff had pleaded that the second, third and

A fourth defendants are at all material times the guarantors of the first defendant. The third and fourth defendants disputed this, maintaining that the second and third defendants were not guarantors, at all material times, of the first defendant but were only liable as guarantors in respect of those letters of guarantee that were valid in law and binding upon them and strictly in accordance with the terms and conditions B contained therein. The plaintiff responded that the second and third defendants were the guarantors under the letter of guarantee dated 1 July 1982 whilst the third and fourth defendants were guarantors under the letter of guarantee dated 28 October 1983.

C The second defendant disputed the plaintiff's assertion that he was at all material times the guarantor to the first defendant maintaining that the second defendant had been released and discharged as guarantor by the plaintiff and replaced by the fourth defendant. The plaintiff responded that the second defendant was never discharged from his liability under the letter of guarantee dated 1 July 1982 and that pursuant to the letter of offer dated 7 July 1983, the fourth defendant was to replace the second D defendant in relation to the guarantee for the RM28m bank guarantee facility only and that the plaintiff was claiming against the second defendant only for his liability under his guarantee for the overdraft and not for the bank guarantee facility. The plaintiff contended that by a letter of guarantee in writing dated the 1 July 1982 executed by the second and third defendants, the second and third defendants for the E consideration therein set out, guaranteed payment to the plaintiff on demand of all monies due and remaining unpaid by the first defendant to the plaintiff in respect of the overdraft facility together with interest thereon until the date of full settlement and that the plaintiff relied on this first letter of guarantee for its full term and effect.

F The first, third and fourth defendants disputed this on grounds that as the fixed loan of RM10m as granted pursuant to the letter of offer dated 10 June 1982 was deemed fully paid up on or about 7 July 1983, the third defendant's liability pursuant to the first letter of guarantee was automatically extinguished and therefore the third defendant was not liable in respect of the amounts guaranteed by the first letter of guarantee. The plaintiff responded to the first, third and fourth defendants that the G RM10m bridging loan was converted to an overdraft at the request of the first defendant by their letter dated 8 September 1983 and this debt had not been repaid by the defendants. The plaintiff maintained that the first letter of guarantee was a continuing guarantee and the terms of the said guarantee also preserved the third defendant's liability despite any arrangement or variation of the indebtedness due to the plaintiff. The second defendant disputed the plaintiff's assertion, maintaining H that the second defendant had been released and discharged from the guarantee by the plaintiff and replaced by the fourth defendant. Further, according to the second defendant the overdraft facility together with the guarantee had been cancelled and superseded by subsequent banking facility provided and thus the guarantee was null and void against the second defendant. The first defendant only disputed the interest I rate levied on the ground that it was not the contractual rate of interest. There was no dispute on the principal amount by the first defendant.

When the decision was given, counsel for the defendants applied for a stay of execution on the ground that there was a proceeding before the registrar for assessment of damages in a substantial claim against the plaintiff where the sum was

about equal to the sum in this judgment. This was disputed by counsel for the plaintiff who submitted the application should be made formally.

Held, allowing the plaintiff's claim against the first, third and fourth defendants and dismissing the claim against the second defendant:

(1) A bridging loan was drawn down and in due course was repaid, and the outstanding sum might only increase because of unpaid interest and penalties. An overdraft facility is more flexible. The outstanding sum could fluctuate as amounts were repaid and new drawdown was made. The flexibility is the reason for the application to convert to an overdraft facility. The second guarantor faced a potentially greater risk under the overdraft facility than expected in the first place when he guaranteed the bridging loan. The obvious question; did the second guarantor agree to undertake such increased risk. There is no evidence of consent by the second defendant. It was not disputed that the variance was at the first defendant's request. Applying s 86 of the Contracts Act 1950, the second defendant cannot be held liable under the first guarantee after the bridging loan was converted to an overdraft facility without his consent being sought. Since there was no defined claim of liability arising before the conversion to an overdraft facility, the claim against the second defendant must, therefore be dismissed on that ground (see paras 66, 68).

(2) The third defendant who signed the letter dated 8 September 1983 for the first defendant which sought the conversion of the bridging loan to an overdraft facility cannot now say he did not give any consent. He is deemed to have consented when he signed the request. He was estopped from denying his consent. The third defendant remained liable under the first letter of guarantee as well as under the second letter of guarantee but since he was liable under the second guarantee, the first guarantee was irrelevant (see para 69).

(3) By virtue of the letter of guarantee dated 25 October 1983, the third and fourth defendants guaranteed payment of bank guarantee facility together with interest thereon (see para 70).

(4) The objection by the first defendant on the interest rate holds no merit since the agreement provided the plaintiff with rights to vary the rate of interest. The plaintiff's claim against the first defendant which includes interest at the rate of 16.5% per annum on monthly rests basis from 27 November 1986 until full payment was allowed (see paras 79–80).

(5) Even though acceptance of the terms of a letter of offer created an agreement upon its acceptance, it was implicit that there would be written agreements and guarantees to be executed. The fact of acceptance of the letter of offer does not prevent one party from proposing new terms to the other or for the other to accept it. When the agreements and guarantees were signed with terms that differed from the letter of offer, the new terms were accepted and the previous agreement from the acceptance of the letter of offer was superseded. The better indicator of what was intended, understood and acted upon by the plaintiff and the third and fourth defendants would be the terms of the letter of offer, the letter approving the fourth defendant as a surety, the letter of guarantee

signed by the third and fourth defendants, rather than what interpretation any of the parties may, after the commencement of these proceedings, prefer, advance and maintain to their advantage. In this regard originally it was the second defendant who was to sign the second guarantee for RM38m. In allowing replacement of the second defendant with the fourth defendant the letter from the plaintiff stated clearly that the banking facilities totalling RM38m are therefore to be guaranteed jointly and severally by the third and fourth defendant in their personal capacities. Subsequently, the fourth defendant signed a guarantee for RM38m. At no time was distinction made between the original RM10m facility and the additional RM28m facility as affects the second and fourth defendants. The objections by the third and fourth defendants must, therefore, fail (see paras 87–88).

(6) Since the facts relied upon were disputed, a formal application was necessary for a stay of execution so that the facts relied upon could be verified (see para 92).

(7) The law on a stay of execution was well trodden. Special circumstances must be shown. The main special circumstance is that the appeal if successful will be rendered nugatory. The circumstances must relate to the enforcement of the judgment and not the normal effect of the enforcement of a judgment such as hardship arising from the enforcement thereof, or revisit or reopen the grounds that were raised or could have been raised and dealt with in the trial (see para 93).

(8) The defendants have failed to discharge the onus that it was upon them to show special circumstances and their application was accordingly dismissed (see para 93).

[Bahasa Malaysia summary

Melalui tindakan ini, plaintif memohon penghakiman: (a) Bertentangan dengan defendan pertama, amaun sebanyak RM47,884,178.68 yang kena dibayar kepada plaintif pada 26 November 1986 bersama dengan faedah sehingga jumlah penuh; (b) Bertentangan dengan defendan pertama dan kedua sebagai penjamin di bawah surat gerenti pertama, jumlah sebanyak RM14,149,979.35 yang kena dibayar kepada plaintif pada 26 November 1986 bersama bunga sehingga jumlah penuh; dan (c)Bertentangan dengan defendan ketiga dan keempat masing-masing sebagai penjamin di bawah surat gerenti yang kedua, jumlah RM33,734,199.33 yang merupakan amaun tertunggak yang kena dibayar kepada plaintif di bawah kemudahan surat gerenti kedua pada 26 November 1986 bersama dengan bunga sehingga jumlah penuh.

Kemudahan-kemudahan pada mulanya adalah pinjaman sebanyak RM10j pada kadar 15.5% setahun bagi 2½ tahun dari tarikh susutan termasuk dua tahun tempoh tangguh yang telah diperuntukkan dalam bayaran pokok. Plaintif telah plid bahawa kedua, ketiga dan keempat defendan adalah pada semua masa material penjamin defendan pertama. Defendan ketiga dan keempat telah mempertikaikan ini, dengan menyatakan bahawa defendan kedua dan ketiga bukanlah penjamin-penjamin defendan pertama pada semua masa material tetapi hanya bertanggungjawab sebagai penjamin-penjamin berkenaan surat-surat gerenti tersebut di mana adalah sah di sisi

undang-undang dan adalah terikat atas mereka dan mematuhi dengan ketat terma-terma dan syarat-syarat yang terkandung didalamnya. Plaintif telah menjawab bahawa defendan kedua dan ketiga adalah penjamin-penjamin di bawah surat gerenti bertarikh 1 Julai 1982 manakala defendan ketiga dan keempat adalah penjamin-penjamin di bawah surat gerenti bertarikh 28 Oktober 1983.

Defendan kedua mempertikaikan penyataan plaintif bahawa plaintif adalah pada semua masa material penjamin kepada defendan pertama, dengan menyatakan bahawa defendan kedua telah dilepaskan sebagai penjamin oleh plaintif dan diganti oleh defendan keempat. Plaintif menjawab bahawa defendan kedua tidak pernah dilepaskan daripada liabilitinya di bawah surat gerenti bertarikh 1 Julai 1982 dan berikutan surat tawaran bertarikh 7 Julai 1983, defendan keempat adalah diperlukan untuk menggantikan defendan kedua berkenaan kepada jaminan sebanyak RM28j kemudahan bank gerenti sahaja dan bahawa plaintif adalah menuntut terhadap defendan kedua hanya untuk liabilitinya sahaja di bawah jaminannya bagi overdraft dan bukan untuk bank gerenti kemudahan. Plaintif menyatakan bahawa melalui surat gerenti dalam tulisan bertarikh 1 Julai 1982 yang telah dikuatkuasakan oleh defendan kedua dan ketiga, defendan kedua dan ketiga telah menjamin bayaran kepada plaintif ke atas permintaan kesemua wang yang kena dibayar oleh defendan pertama kepada plaintif berdasarkan kemudahan overdraf bersama dengan bunga sehingga tarikh penuh penyelesaian dan juga plaintif telah bergantung atas surat gerenti pertama bagi terma-terma penuhnya dan kesannya.

Defendan pertama, ketiga dan keempat telah mempertikaikan ini atas alasan bahawa seperti mana pinjaman tetap RM10j diberikan berikutan surat tawaran bertarikh 10 Jun 1982, adalah dikatakan telah dibayar penuh pada atau keliling 7 Julai 1983, liability defendan ketiga berikutan surat gerenti pertama telah dengan automatiknya dilenyapkan dan oleh itu defendan ketiga adalah tidak bertanggungjawab terhadap amaun yang digerentikan melalui surat gerenti pertama. Plaintif menjawab terhadap defendan pertama, ketiga dan keempat bahawa RM10j pinjaman perantara telah ditukar kepada overdraf atas permintaan defendan pertama melalui surat bertarikh 8 September 1983 dan hutang ini belum dibayar oleh defendan-defendan. Plaintif menyatakan bahawa surat gerenti pertama adalah satu gerenti yang berterusan dan terma-terma gerenti tersebut juga mengekalkan liability defendan ketiga meskipun terdapat sebarang pengurusan atau variasi penghutangan yang kena dibayar kepada plaintif. Defendan kedua telah mempertikaikan penyataan plaintif dengan menyatakan bahawa defendan kedua telah dilenyapkan daripada gerenti oleh plaintif dan diganti oleh defendan keempat.

Tambahan pula, berikutan defendan kedua, kemudahan overdraf bersama dengan gerenti telah dibatalkan dan telah digantikan oleh kemudahan bank yang berikutnya dan bahkan gerenti tersebut adalah batal dan tidak sah terhadap defendan kedua. Defendan pertama hanya mempertikaikan kadar bunga yang dikenakan atas alasan bahawa ia bukan satu kadar bunga kontrak. Tidak ada pertikaian di atas amaun pokok oleh defendan pertama.

Apabila keputusan diberikan, peguam bagi defendan-defendan telah memohon untuk penggantungan perlaksanaan atas alasan bahawa terdapat prosiding di hadapan pendaftar bagi satu penaksiran ganti rugi dalam tuntutan yang besar terhadap plaintif di mana jumlah adalah sama dengan jumlah dalam penghakiman

tersebut. Ini telah dipertikaikan oleh peguam bagi plaintif yang telah menghujahkan bahawa permohonan sepatutnya dibuat secara rasmi.

Diputuskan, membenarkan tuntutan plaintif terhadap defendan pertama, ketiga dan keempat dan menolak tuntutan terhadap defendan kedua:

(1) Satu pinjaman perantara telah dilangsaikan keseluruhan jumlahnya dan pada masa akan datang telah dibayar dan jumlah tertunggak hanya akan meningkat disebabkan bunga yang belum dibayar dan penalty. Satu kemudahan overdraf adalah lebih mudah digunakan. Jumlah tertunggak boleh berubah seperti amaun telah dibayar dan pelepasan baru boleh dibuat. Perubahan adalah sebab bagi permohonan tersebut perlu ditukar kepada kemudahan overdraf. Penjamin kedua telah menghadapi risiko lebih besar di bawah kemudahan overdraf daripada yang dijangkakan apabila telah menjamin pinjaman perantara. Soalan yang ketara adalah sama ada beliau bersetuju untuk mengambil risiko yang tinggi ini. Tidak ada keterangan persetujuan oleh defendan kedua. Tidak boleh dipertikaikan bahawa variasi adalah pada permintaan defendan pertama. Menggunakan s 86 Akta Kontrak 1950, defendan kedua tidak bertanggungjawab di bawah gerenti pertama selepas pinjaman perantara telah ditukar kepada kemudahan overdraf tanpa persetujuannya. Memandangkan tidak ada tuntutan liabiliti yang jelas sebelum pertukaran kepada kemudahan overdraf, tuntutan terhadap defendan kedua mesti dibatalkan atas alasan tersebut (lihat perenggan 66 & 68).

(2) Defendan ketiga yang telah menandatangani surat bertarikh 8 September 1983 bagi defendan pertama di mana pertukaran pinjaman perantara telah dipohon kepada kemudahan overdraf tidak boleh dikatakan sekarang bahawa beliau tidak memberi persetujuan. Beliau adalah dikatakan telah bersetuju untuk menandatangani apabila telah menandatangani permintaan tersebut. Beliau adalah diestop daripada menafikan persetujuannya. Defendan ketiga bertanggungjawab di bawah surat gerenti pertama dan juga surat gerenti kedua tetapi memandangkan beliau bertanggungjawab di bawah surat gerenti kedua, gerenti pertama adalah tidak relevan (lihat perenggan 69).

(3) Berikutan tarikh 25 Oktober 1983 surat gerenti, defendan-defendan ketiga dan keempat menjamin bayaran kemudahan bank gerenti bersama bunga di atasnya (lihat perenggan 70).

(4) Bantahan oleh defendan pertama atas kadar bunga tidak memegang sebarang merit memandangkan perjanjian memberikan plaintif hak-hak untuk menukar kadar bunga. Tuntutan plaintif terhadap defendan pertama yang mana termasuk bunga pada kadar 16.5% per annum atas dasar baki bulanan dari 27 November 1986 sehingga bayaran penuh dibenarkan (lihat perenggan 79–80).

(5) Walaupun penerimaan terma-terma surat tawaran telah mewujudkan satu perjanjian di atas penerimaannya, adalah ketara bahawa terdapat perjanjian bertulis dan gerenti untuk dilaksanakan. Penerimaan surat tawaran tidak menghindarkan satu parti daripada mengeluarkan terma-terma baru kepada parti yang lain atau bagi satu parti untuk menerimanya. Apabila perjanjian dan

gerenti telah ditandatangani dengan terma-terma yang berlainan daripda surat tawaran, terma-terma baru telah diterima dan perjanjian sebelumnya daripada penerimaan surat tawaran adalah diganti. Apa yang diniatkan, difahamkan dan dilaksanakan oleh plaintif dan defendan-defendan ketiga dan keempat merupakan terma-terma surat tawaran, surat membenarkan defendan keempat sebagai penjamin, surat gerenti yang ditandatangani oleh defendan ketiga dan keempat daripada apa interpretasi parti-parti mungkin suka, selepas permulaan prosiding menginginkan kebaikannya. Berkenaan ini, defendan kedua adalah sepatutnya menandatangani gerenti kedua bagi RM38j. Dalam membenarkan penggantian defendan kedua dengan defendan keempat, surat daripada plaintif menjelaskan bahawa kemudahan banking dengan jumlah RM38j adalah perlu digerentikan bersama oleh defendan ketiga dan keempat dalam capacitynya tersendiri. Kemudiannya, defendan keempat telah menandatangani gerenti untuk RM38j. Dalam masa, tiada perbezaan dibuat antara RM10j kemudahan dan tambahan RM28j kemudahan seperti mana menganggu defendan-defendan kedua dan keempat. Bantahan-bantahan oleh defendan ketiga dan keempat mesti gagal (lihat perenggan 87–88).

(6) Memandangkan fakta-fakta yang dipegang dipertikaikan, satu permohonan formal adalah perlu bagi penggantungan perlaksanaan supaya fakta-fakta yang dipegang boleh disahkan (lihat perenggan 92).

(7) Undang-undang dalam penggantungan perlaksanaan adalah baik. Keadaan istimewa mesti ditunjukkan. Keadaan istimewa yang utama adalah rayuan jika berjaya akan menjadi tidak berguna. Keadaan-keadaan istimewa mesti berkaitan dengan perlaksanaan penghakiman dan bukan efek-efek biasa perlaksanaan penghakiman seperti kesusahan yang timbul daripada perlaksanaan tersebut atau membuka alasan-alasan yang ditimbulkan atau yang boleh ditimbulkan dan diuruskan dengan di dalam perbicaraan (lihat perenggan 93).

(8) Defendan-defendan telah gagal untuk melepaskan beban bahawa adalah atas mereka untuk menunjukkan keadaan-keadaan istimewa dan permohonan mereka dibatalkan (lihat perenggan 93).]

Notes

For cases on guarantee for loan facility and interest, see 3(2) *Mallal's Digest* paras 3457–3497.

For cases on interest on banking law, see 1 *Mallal's Digest* para 1853.

For cases on liability of guarantors, see 3(2) *Mallal's Digest* paras 3462–3489.

For cases on stay of execution, see 2 Consolidated Subject Index *Mallal's Digest* paras 5754–5755.

Legislation referred to

Contracts Act 1950 ss 79, 86

Cases referred to

Lum Choon Realty Sdn Bhd v Perwira Habib Bank Malaysia Bhd [2003] 4 MLJ 409 (refd)

A *United Asian Bank Bhd v Kamariah bte Mohd Yusoff T/A Kosco International & 2 Ors* [1989] 2 CLJ 886 (refd)
Yew Wan Leong v Lai Kok Chye [1990] 2 MLJ 152 (refd)

SM Yoong (MF Wong & R Tharmy with him)(Shook Lin & Bok) for the plaintiff.
Dato Mahinder Singh Dulku (Harjit Singh Sangay with him)(Harjit Singh Sangay &
B *Co) for the first, third & fourth defendants.*

Abdul Wahab Patail J:

C **[1]** By this action the plaintiff, Perwira Habib Bank Malaysia Bhd is seeking judgment:

(a) as against the first defendant, Lum Choon Realty Sdn Bhd the sum of RM47,884,178.68 due and owing to the plaintiff as at 26 November 1986 together with interest thereon at the rate of 16.5% per annum on monthly rests
D basis from 27 November 1986 until full payment;

(b) as against the second and third defendants, Tan Chong Phok and Tan Chong Keat respectively, as guarantors under the first letter of guarantee the sum of RM14,149,979.35 due and owing to the plaintiff as at 26 November 1986 together with interest thereon at the rate of 16.5% per annum on monthly rest
E basis from 27 November 1986 until full payment;

(c) as against the third and fourth defendants, Tan Chong Keat and Khaw Siew Suan (f) respectively, as guarantors under the second letter of guarantee the sum of RM33,734,199.33 being the outstanding sum due and owing to the plaintiff under the bank guarantee facility as at 26 November 1986 together
F with interest thereon at the rate of 16.5% per annum on monthly rest basis from 27 November 1986 until full payment;

(d) costs;

(e) such further and other relief as this honourable court may deem fit to grant.

G **[2]** The claim is made in respect of certain facilities extended to the first defendant by the plaintiff. The second, third and fourth defendants were guarantors in respect of those facilities.

H **[3]** The facilities were initially a term loan of RM10m at the rate of 15.5% per annum for 2 1/2 years from the date of drawdown, inclusive of a 2 year grace period in repayment of the principal.

THE PLEADINGS

I **[4]** The parties were directed during case management to:

(a) analyse the pleadings so as to identify what was disputed on the pleadings;

(b) classify such disputes as to whether it is a question of law or question of fact, and

(i) if it is a question of law, to set out the question of law; and

(ii) if it is a question of fact, to set out the particulars relied upon by each party;

(c) clarify the evidence relied upon by each other in support of the particulars that are disputed.

[5] This simple process of analysis of the pleadings quickly identifies the disputes that are raised upon the pleaded case. Classification of the disputes identified is the next step. It sorts out issues of law from issues of fact. Where an issue of law could dispose of the action, it could be proceeded to without wasting time and expense upon issues of fact. If the case cannot be disposed off on a question of law, and questions of fact need to be dealt with, then the disputes on questions of facts are examined in more detail. If the fact disputed is a primary fact, the parties proceed with the verification process. If the disputed fact is a secondary fact, i.e. a fact that is dependent upon and is a conclusion of inference from other primary facts, then particulars of the other facts are to be provided, so that the other party may respond to it. In the event such a particular of fact is disputed, then the parties proceed with the verification process as for disputed primary facts.

[6] The process of verifying the evidence relied upon in respect of a disputed primary fact is embodied in the procedures of discovery and production and of interrogatories. The party who asserts the disputed fact or particular must notify the other party of the evidence it relies upon and offer the same for verification by the other party. If it is able to produce some evidence to support its assertion and the primary fact is still disputed by the other party, then the evidential burden shifts to the other party to produce the evidence it relies upon for verification also. The object of the process is to enable counsel for the parties, acting professionally to see the evidence bearing upon a disputed fact as a whole and re-evaluate their positions so that only bona fide disputes of fact material to the case and depending upon oral testimony need to incur time and expense of a trial, for the oral testimony to be examined and tested by cross-examination and re-examined as necessary. Where no oral testimony needs to be examined and tested, then a hearing date would be assigned to hear submissions upon the issues such as of law, interpretation and inferences or conclusions of fact to be drawn.

[7] The analysis of the pleadings brought out the following areas of dispute.

A: THAT THE FIRST DEFENDANT WAS THE PLAINTIFF'S CUSTOMER OF AN OVERDRAFT FACILITY OF RM10M AND BANK GUARANTEE FACILITY OF RM28M.

[8] The plaintiff had pleaded that the first defendant was at all material times the plaintiff's customer to whom the plaintiff had granted an overdraft facility of RM10m and a banker's guarantee facility of RM28m (hereinafter respectively referred to as 'the overdraft facility' and 'the bank guarantee facility').

[9] The first, third and fourth defendants disputed this. They asserted that the plaintiff had not granted an overdraft facility but a term loan of RM10m at the rate

of 15.5% per annum repayable 2½ years from date of drawdown inclusive of two years grace period on principal repayment and upon other terms and conditions as set out in the letter of offer dated 10 June 1982. They did not dispute that the plaintiff had granted a banker's guarantee facility pursuant to a letter of offer dated 7 July 1983 upon terms and conditions therein set out. The letter of offer did not contain any stipulation as to any interest payable by the defendants on this guarantee facility. The plaintiff maintained that the interest rate (and the plaintiff's right to vary the same) for the bank guarantee facility is set out in the charge annexure executed by the first defendant in relation to the charge over the land granted to the plaintiff to secure the bank guarantee facility.

[10] The second defendant similarly disputed whether or not it was an overdraft facility. The second defendant further claimed he did not at any time provide any guarantee for these facilities.

[11] The plaintiff replied the RM10 was initially granted as a bridging loan but that this was converted into an overdraft facility at the request of the first defendant as evidenced by the first defendant's letter to the plaintiff dated 8 September 1983.

[12] The plaintiff said the second defendant had (together with the third defendant) signed the letter of guarantee dated 1 July 1982, guaranteeing the RM10 m facility, that such guarantee was stated therein to be a continuing security and the terms of the said guarantee also preserved the second defendant's liability despite any arrangement or variation of the indebtedness due to the plaintiff.

B: THAT THE SECOND, THIRD AND FOURTH DEFENDANTS WERE GUARANTORS OF THE FIRST DEFENDANT

[13] The plaintiff had pleaded that the second, third and fourth defendants are at all material times the guarantors of the first defendant and having their addresses for service at 65, Beach Street, Penang; 8G, Jalan Bunga Pudak, Tanjung Bungah, Penang and at 3P, Medan Lembah Pantai, Tanjung Bungah, Penang respectively.

[14] The third and fourth defendants disputed this maintaining that the first and third defendants were not guarantors, at all material times of the first defendant simpliciter *but were only liable as guarantors in respect of those letters of guarantee that were valid in law and binding upon them and strictly in accordance with the terms and conditions contained as explained further below.*

[15] The plaintiff responded it was unable to comprehend the aforesaid dispute of fact. The plaintiff repeated that the second and third defendants were the guarantors under letter of guarantee dated 1 July 1982 whilst the third and fourth defendants were guarantors under the letter of guarantee dated 28 October 1983 and these said defendants signed the guarantees. The plaintiff maintained the same are valid and binding on them accordingly.

[16] The second defendant disputed the plaintiff's assertion that he was at all material times the guarantor to the first defendant, maintaining that the second defendant had been released and discharged as guarantor by the plaintiff and replaced by the fourth defendant.

[17] The plaintiff responded that the second defendant was never discharged from his liability under the letter of guarantee dated 1 July 1982. The plaintiff sought to explain that pursuant to the letter of offer dated 7 July 1983, the fourth defendant was to replace the second defendant in relation to the guarantee for the RM28m bank guarantee facility only and that the plaintiff is claiming against the second defendant only for his liability under his guarantee for the overdraft and not for the bank guarantee facility.

C: THAT BY THE 1 JULY 1982 LETTER OF GUARANTEE, SECOND AND THIRD DEFENDANTS GUARANTEED PAYMENT OF THE OVERDRAFT FACILITY GRANTED TO FIRST DEFENDANT.

[18] The plaintiff had pleaded that by a letter of guarantee in writing dated 1 July 1982 executed by the second and third defendants, the second and third defendants for the consideration therein set out, guaranteed payment to the plaintiff on demand of all monies due and remaining unpaid by the first defendant to the plaintiff in respect of the overdraft facility together with interest thereon until the date of full settlement and that the plaintiff relied on this first letter of guarantee for its full term and effect.

[19] The first, third and fourth defendants disputed this on grounds that as the fixed loan of RM10m, as granted pursuant to the letter of offer dated 10 June 1982 was deemed to be fully paid up on or about 7 July 1983, the third defendant's liability pursuant to the first letter of guarantee was automatically extinguished, and therefore the third defendant was not liable in respect of the amounts guaranteed by the first letter of guarantee.

[20] The plaintiff responded to the first, third and fourth defendants that the RM10m bridging loan was converted to an overdraft at the request of the first defendant by their letter dated 8 September 1983 and this debt has not been repaid by the defendants. Therefore, it reasoned, the third defendant's liability under the letter of guarantee dated 1 July 1982 is for the sum not exceeding the principal sum of RM10m, with interest, charges and costs thereon. The plaintiff maintained that the first letter of guarantee was a continuing guarantee and the terms of the said guarantee also preserved the third defendant's liability despite any arrangement or variation of the indebtedness due to the plaintiff. The plaintiff thus maintained the first letter of guarantee is valid and binding against the third defendant and the plaintiff asserted it is unable to comprehend why the first, third and fourth defendants say that this facility was deemed to be fully paid up.

[21] The second defendant disputed the plaintiff's assertion, maintaining that the second defendant has been released and discharged from the guarantee by the

plaintiff and replaced by the fourth defendant. Further, according to the second defendant the overdraft facility together with the guarantee had been cancelled and superseded by subsequent banking facility provided and thus the guarantee is null and void against the second defendant.

[22] The plaintiff responded that the overdraft facility of RM10m was never cancelled nor superseded as alleged and the first letter of guarantee dated 1 July 1982 is valid and enforceable.

D: THAT BY 25 OCTOBER 1983 LETTER OF GUARANTEE THE THIRD AND FOURTH DEFENDANTS GUARANTEED PAYMENT OF BANK GUARANTEE FACILITY TOGETHER WITH INTEREST THEREON

[23] The plaintiff pleaded that by a letter of guarantee in writing dated 25 October 1983 executed by the third and fourth defendants (hereinafter referred to as 'the second letter of guarantee') the third and fourth defendants, for the consideration therein set out, guaranteed payment to the plaintiff on demand of all monies due and remaining unpaid by the first defendant to the plaintiff in respect of the bank guarantee facility together with interest thereon until date of full payment. The plaintiff relied on the second letter of guarantee for its full term and effect.

[24] This is disputed by the first, third and fourth defendants who say that the second letter of guarantee dated 28 October 1983 to guarantee 'banking facilities up to RM30m' allegedly granted by the plaintiff to the first defendant whereas the letter of offer dated 7 July 1983 was for banking facilities up to the limit of RM10m for bridging loan and RM28m for guarantee and under which the guarantors were to be the second and the third defendants but the second defendant did not execute the second letter of guarantee but was executed by the third and fourth defendants. They argue the fourth defendant did not request for the said facilities, and therefore the letter of guarantee is in conflict with the letter of offer. They also maintain no bridging loan was ever actually advanced to the first defendant and the letter of guarantee therefore bears no relation to the actual facilities granted to the first defendant. The first, third and fourth defendants also asserted the rate of interest payable is also not set out in this guarantee. The first, third and fourth defendants raised as a question of law whether the letter of guarantee in the above circumstances is valid and binding upon the third and fourth defendants.

[25] The plaintiff rejoined that the purpose of the RM28m bank guarantee facility was for the plaintiff to furnish its bank guarantee to financiers (including offshore lenders) of the first defendant. The plaintiff explained that the letter of guarantee dated 28 October 1983 was to secure facilities up to the principal sum of RM30m to take into account the difference in exchange rate under the foreign currency bank guarantee issued by the plaintiff to the first defendant's foreign financiers. The plaintiff asserted the first, third and fourth defendants have agreed to this and are estopped from stating otherwise. The plaintiff agreed that it was the first defendant's request to substitute the second defendant with the fourth defendant as co-guarantor for the letter of guarantee dated 28 October 1983, as evidenced by the plaintiff's letter dated 29 July 1983. The plaintiff maintained there is no conflict

therefore between the letter of offer dated 7 July 1983 and the letter of guarantee dated 28 October 1983 which is valid and binding on the third and fourth defendants.

[26] The second defendant responded that he had no knowledge since he had resigned from the first defendant's company on 1 July 1983. The plaintiff did not disagree, adding only that there is no claim against the second defendant in connection with this.

E: PLAINTIFF HAD ISSUED ON 1 NOVEMBER 1983 BANK GUARANTEE OF US$6 MILLION AND 19 MARCH 1984 BANK GUARANTEE FOR RM14 MILLION

[27] The plaintiff pleaded that pursuant to the bank guarantee facility the plaintiff had on 1 November 1983 issued a bank guarantee for the sum of US$6m to Elders Pica (Pte) Limited Singapore [formerly known as Private Investment Company for Asia (PICA) S.A.] as agent for Bank of America National Trust Saving Association, Indian Bank, Westpac Banking Corporation and Private Investment Company for Asia (PICA) S.A. (hereinafter referred to as 'the Off-Shore Loan Lenders') and had on 19 March 1984 issued a bank guarantee for the sum of RM14m to PICA (Malaysia) Sdn Bhd as agent for Aseambankers Malaysia Berhad, Bank of America, National Trust & Saving Association and D & C Nomura Merchant Bankers Berhad (hereinafter referred to as 'the Domestic Loan Lenders').

[28] This is disputed by the third & fourth defendants. They say that the letter of offer dated 7 July 1983, while approving a bank guarantee in the sum of RM28m went on to state that the purpose of the bank guarantee was 'To guarantee the repayment of US$12.0m offshore loan to be obtained by you [Lum Choon Realty Sdn Bhd] for the purpose of financing your housing project known as Taman Bukit Gambier, Penang' and also contained other terms and conditions to be fulfilled by the first defendant before utilisation of facilities when in point of fact none of the matters averred to in this part of the statement of claim are covered by the alleged bank guarantee facility.

[29] The first, third and fourth defendants also raised a question of law whether the defendants are liable in respect of the matters set out herein as they bear no relation to the agreed terms of the letter of offer dated 7 July 1983.

[30] The plaintiff rejoined that the first, third and fourth defendants never pleaded its dispute as to the purpose of the bank guarantee facility had not condescended to particulars of their aforesaid dispute and the plaintiff is unable to comprehend the dispute raised. The plaintiff asserted the first, third and fourth defendants had admitted to the granting of the bank guarantee facilities and cannot now dispute the fact of issuance of the bank guarantee by the plaintiff to the first defendant's financiers.

[31] The second defendant disputed on a question of law and fact. He said the facility granted by the plaintiff is not within the knowledge of defendant as he had resigned as the director of the first defendant company on 1 July 1983 and the second defendant has been released and discharged from the guarantee by the plaintiff. Further, the second defendant said the amount provided by the plaintiff was not contemplated in the guarantee signed by the second defendant which is a past consideration. The plaintiff responded that without admission to the facts alleged by the second defendant, there is no claim against the second defendant under the bank guarantee facility.

F: PLAINTIFF'S CLAIM AGAINST THE FIRST DEFENDANT

[32] The plaintiffs claimed against the first defendant as principal for the sum of RM47,884,178.68 being the total outstanding sum due and payable to the plaintiff in respect of the overdraft facility and the bank guarantee facility as at the 26 November 1986 with interest thereon at a rate per annum which is 6% above the bank's base lending rate currently at 10.5% on monthly rests basis from 27 November 1986 till date of full payment.

[33] This is disputed by the first defendant who maintained the amount claimed is incorrectly computed that the rate of interest levied on the alleged principal debt is not the agreed contractual rate or rates of interest. Therefore, the first defendant does not owe the plaintiff the sum of RM47,884,178.68 as at 26 November 1986 as alleged and as the amount claimed is patently incorrect, the plaintiff's claim ought to be dismissed in line with costs.

[34] The plaintiff rejoined that the sum claimed against the first defendant is correct and in any event, the interest rate is subject to the plaintiff's right of variation, in any event, the first defendant cannot deny the principal sum of the facilities granted, and even if the amount claimed is found to be inaccurate, the defendants are not discharged of their liability to the plaintiff.

[35] The second defendant disputed this on the ground that the sum of RM47,884,178.68 and the base lending rate of 10.5% from 27 November 1986. Defendant has been released and discharged from the guarantee. In the alternative, the guarantee is not enforceable against second defendant pursuant to s 86 of the Contracts Act 1950.

[36] The plaintiff responded that the claim against the second defendant is only in respect of the overdraft facility, that the second defendant was never released or discharged as guarantor under the letter of guarantee dated 1 July 1982, the second defendant's liability thereunder is continuing and s 86 of the Contracts Act 1950 was not pleaded in the defence and in any event is not applicable by virtue of the terms of the letter of guarantee. The plaintiff maintained the interest rate charged was known to the defendants and in any event, this goes only to the issue of quantum and not liability.

G: PLAINTIFF'S CLAIM AGAINST THE SECOND AND THIRD DEFENDANTS

[37] The plaintiff's claim against the second and third defendants as guarantors under the first letter of guarantee for the sum of RM14,149,979.35 being the outstanding balance of the overdraft facility as at 26th day of November 1986 together with interest thereon at the rate of 6% above the plaintiff's base lending rate currently at 10.5% on monthly rests basis from 27 November 1986 till date of full payment.

[38] The first, third and fourth defendants disputed on the grounds that the amount claimed in the sum of RM14,149,979.35 as at 26 November 1986 is incorrect. They say the calculation of interest is equally incorrect as the rate of interest levied is not the agreed contractual rate or rates and as the sum claimed is grossly incorrect, the third defendant is not liable to pay the sum as claimed in the statement of claim.

[39] The plaintiff rejoined that the sum claimed against the third defendant is correct and in any event, the interest rate is subject to the plaintiff's right of variation and in any event, even if the amount claimed is found to be inaccurate, the defendants are not discharged of their liability to the plaintiff and this only goes to the issue of quantum and not liability.

[40] The second defendant disputed the sum of RM47,884,178.68 and the base lending rate of 10.5% from 27 November 1986. The second defendant says he had been released and discharged from the guarantee. In the alternative, the guarantee is not enforceable against the second defendant pursuant to s 86 of the Contracts Act 1950. The plaintiff's response to the claim against the second defendant is only in respect of the overdraft facility. The second defendant was never released or discharged as guarantor under the letter of guarantee dated 1 July 1982 and the second defendant's liability thereunder is continuing. The plaintiff says that s 86 of the Contracts Act 1950 was not pleaded in the defence and in any event is not applicable by virtue of the terms of the said letter of guarantee, that the interest rate charged was known to the defendants and in any event, this goes only to the issue of quantum and not liability.

H: PLAINTIFF'S CLAIM AGAINST THE THIRD AND FOURTH DEFENDANTS

[41] The plaintiff's claim against the third and fourth defendants as guarantors under the second letter of guarantee for the sum of RM33,734,199.33 being the outstanding sum due to the plaintiff under the bank guarantee facility which the plaintiff has paid to the agents for the off-shore loan lenders and the domestic loan lenders respectively under the terms of the bank guarantees issued by the plaintiff and referred to in para 7 above together with interest thereon at the rate aforesaid.

[42] The first, third and fourth defendants disputed this assertion on grounds that the amount of RM33,734,199.33 claimed is incorrect. They say the rates of interest levied are not the contractual rates of interest and the fourth defendant did not request for the alleged facilities at all. They also say the letter of offer dated 7 July 1983 required the second and third defendants to execute the relevant letter of guarantee but the second defendant did not execute this guarantee and the alleged second guarantee is invalid and not binding on the third and fourth defendants.

[43] The plaintiff asserted it agreed with the first defendant's request to substitute the second defendant with the fourth defendant in the letter of guarantee dated 28 October 1983. The plaintiff asserted that the third and fourth defendant signed the letter of guarantee dated 28 October1983 voluntarily and are bound by the same, that the amount claimed is correct and the plaintiff has a right to vary the interest rate and this issue is one of quantum and not liability.

THE SUBMISSIONS

[44] The following are the basic submissions of the defendants.

[45] Dato' Mahinder Singh Dulku for the first, third and fourth defendants submitted that:

(a) In short all the defendants, in their relevant defences, have, at the outset, specifically and starkly put the accuracy of the plaintiff's claims in issue.

(b) It is also respectfully submitted that it is trite law that all documents which are marked without prejudice and whose contents are not agreed, equally cannot be taken into consideration by this Honourable Court.

(c) The plaintiff has the burden of establishing:

(i) The second letter of guarantee dated 28 October 1983 as set out in para 6 of the amended statement of claim, as its contents are disputed and therefore rendered inadmissible.

(ii) The matters alleged in paragraph 7 of the statement of claim

(iii) The correctness of the sum of RM47,884,178.68 as against the first defendant with interest thereon 'at a rate per annum which is 6% above the bank's base lending rate currently at 10.5% on monthly rest basis from 27 November 1986 till date of full payment as alleged in para 8 of the amended statement of claim.

(iv) The claim against, inter alia, the third defendant under the first letter of guarantee in the sum of RM14,149,979.35 together with interest at the rate of 6% above the plaintiff's base lending rate 'currently at 10.5%' as alleged in para 9 of the amended statement of claim.

(v) The claim of RM33,734,199.33 allegedly payable by the third and fourth defendants pursuant to the alleged second letter of guarantee as alleged in para ten of the amended statement of claim.

(vi) The sums claimed in para 11 of the amended statement of claim with interest thereon at 16.5% per annum.

(d) That the plaintiff has not established, by any admissible evidence whatsoever, the correctness of all the amounts claimed in the amended statement of claim, and therefore has not discharged the burden:

(i) In respect of the banking facility of RM10m, granted pursuant to a letter of offer dated 10 June 1982, the agreed rate of interest is stated to be 15.5% per annum, the drawdown of the facility is progressive spreading over a period of about one year. In the circumstances, it was essential for the plaintiff to establish the date of each drawdown and the applicable rate of interest thereon, and failure to do so would result in the claim as pleaded being ambiguous and patently incorrect. Further, contrary to the agreed rate of interest of 15.5 % per annum, the plaintiff, in para 8 of the amended statement of claim has claimed a new rate of interest 'at the rate of 6% above the bank's base lending rate of 10.5%' making a total of 16.5% per annum. However, in para 11 of the statement of claim, the plaintiff has claimed a flat rate of 16.5% without reference to the base lending rate as aforesaid. Be that as it may, the aforesaid rates are also contrary to the annexure to the charge dated 27 July 1982 which also specified a rate of 15.5%. Also further, the plaintiff has not explained either in the pleadings or in any admissible document as to how it calculated the various sums as claimed in the statement of claim, thus resulting in the claims being unsustainable.

(ii) It is also surprising that notwithstanding the adverse comments made by the Court of Appeal regarding the failure of the plaintiff to provide proper accounts, in a related matter (the charge action) the plaintiff has strangely remained nonchalant notwithstanding the fact that it was put on inquiry at an earlier stage than the present (see Court of Appeal in *Lum Choon Realty Sdn Bhd v Perwira Habib Bank Malaysia Bhd* [2003] 4 MLJ 409).

(iii) Furthermore it must be remembered that the court is confined to the pleadings and the relevant and admissible documents in support thereof. The court ought not 'to enter into the arena' and make out a case for one of the parties contrary to the pleadings. There are a long line of authorities on the subject and need no repetition here. Suffice to say that the aforesaid principle was reaffirmed by the Supreme Court in the case of *Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152.

(iv) It is also trite law that any unilateral increase in the rate of interest, without complying with the strict procedures set out in the agreement between the parties (the requirement of written notice) is not binding, null and void not only as against the borrower but also the guarantor who consequently is also discharged of all liability arising out of his or her guarantee (see the case of *United Asian Bank Berhad v Kamariah bte Mohd Yusoff T/A Kosco International & 2 Ors* [1989] 2 CLJ 886). As the plaintiff in these proceedings have, contrary to the requirement of a written notice as to the variation of the rate of interest, unilaterally inserted a rate of interest not agreed upon, and in any event has not given any written notice of such

increase (a strict requirement in the annexures to the relevant charges in this action) the guarantors are discharged from all liability to the plaintiff as set out in the statement of claim or at all.

(v) It is prayed that the plaintiff's action herein as against the first, third and fourth defendants be dismissed with costs.

[46] Messrs Mureli Navaratnam, solicitors for the second defendant submitted as follows:

(a) We humbly adopt the submission by the first, third and fourth defendants on the issues of the admissibility of the documents insofar as it is relevant to the second defendant.

(b) The plaintiff had failed to address the specific issues raised by the second defendant in his defence and/or in the analysis of pleadings, namely the discharge and release of the second defendant by the plaintiff and the discharge pursuant to the variations of the facility (s 86 of the Contracts Act 1950)

(c) The initial facility that was granted is an outright loan in nature and by the plaintiff's own submission, it was changed to bridging loan pursuant to the second letter of offer which the second defendant never consented to as he had resigned by 1 July 1983. The bridging loan was converted to an overdraft account on 8 September 1983 which by then the second defendant had not only resigned but the second letter of offer as held by the Court of Appeal had superseded and cancelled the first letter of offer

(d) In the circumstances, even going by the plaintiff's own submissions, the facility was only changed after the second defendant's resignation and after the first letter of offer, in which the second defendant had given guarantee, has been superseded and cancelled.

(e) We humbly submit that it is without doubt that this issue is res judicata as it had been decided by the Court of Appeal and the judgment of which was approved by the Federal Court, ie the second letter of offer had superseded and cancelled the first letter of offer.

(f) Interest rate/amount due: The plaintiff had stated in its submissions in paras 11.3 and 11.4 that the change of interest rate is pursuant to the second letter of offer and also a right preserved under the charge to vary interest at its own discretion. This issue we humbly submit had been decided by the Court of Appeal where in its judgment was stated that the plaintiff had failed to state the correct interest rate in the foreclosure action and hence the amount claimed is wrong. In the premises, the amount claimed by the plaintiff against the second defendant, if the second defendant is liable (is denied), is wrong. Therefore, the plaintiff had failed to prove its case against the second defendant in both liability and quantum as submitted in the written submissions.

(g) We humbly submit that the plaintiff had discharged and released the second defendant based on the documents provided by the plaintiff itself. In the circumstances there is no necessity to call for the examination of the defendants in the witness box as these documents are the same documents that the plaintiff is relying on.

(h) In the circumstances, we humbly submit that the plaintiff has failed to prove its case against the second defendant and therefore should accordingly be dismissed.

[47] Ms Yoong Sin Min of Messrs Shook Lin & Bok submitted for the plaintiff as follows:

(a) The plaintiff's claim against the defendants is for the sums due and owing by the first defendant to the plaintiff and guaranteed by the second, third and fourth defendants for the credit facilities granted by the plaintiff to the first defendant

(b) The credit facilities granted by the plaintiff to the first defendant are as follows:

(i) Overdraft facility of RM10m ('Overdraft Facility'); and

(ii) Bankers' Guarantee facility of RM28m ('Bank Guarantee Facility').

Overdraft Facility

(a) By letter of offer dated 10 June 1982 ('the first letter of offer'), the plaintiff had granted the first defendant a loan facility of RM10m. The purpose of the loan was to assist the first defendant in redeeming its lands from another financier and to finance the first defendant's infrastructure works on its lands, for a housing project.

(b) The overdraft facility was secured by:

(i) A letter of guarantee dated 1 July 1982 by the second and third defendants ('the first guarantee');

(ii) First party first charges under Presentation No 10464/82 Jilid 243 Folio 140 over six lots of lands in Mukim 13, Daerah Timur Laut, Pulau Pinang ('the first lands');

(iii) First party first charge under Presentation No 245/82 Jilid 9 Folio 41 over two lots of lands in Mukim 13, Daerah Timur Laut, Pulau Pinang ('the second lands');

(iv) Third party first charges by one Chong Keat Realty Sdn Bhd under Presentation No 10465/82 Jilid 245 Folio 141 over its lands in Mukim 13, Daerah Timur Laut, Pulau Pinang ('the third lands').

The Bank Guarantee Facility

(a) As stated above, the first defendant required an off-shore USD loan to finance the completion of its project. A request was made to the plaintiff to issue a bank guarantee to guarantee the off-shore loan. A copy of the first defendant's letter dated 25 May 1983 to the plaintiff, signed by the defendant is seen at p 98, CBD Vol 1.

(b) By letter of offer dated 7 July 1983 ('the second letter of offer'), the plaintiff and first defendant granted the first defendant the bank garantee facility to

secure the repayment of the said USD12m off-shore loan. The said off-shore loan was to be obtained by the first defendant to finance the first defendant's said housing project known as Taman Bukit Gambier, Penang ('the Gambier Project').

(c) The bank guarantee facility was secured by:

(i) A letter of guarantee dated 28 October 1983 by the third and fourth defendants ('the second guarantee');

(ii) First party second charges under Presentation No 13398/83 Jilid 287 Folio 25 over the first lands;

(iii) First party second charges under Presentation No 267/83 Jilid 10 Folio 74 over the second lands;

(iv) Third party second charges under Presentation No 13395/83 Jilid 282 Folio 24 over the third lands.

(c) The first defendant had sought to raise the USD12m loan through a syndicate of foreign lenders. However, the first defendant only obtained approval from Bank Negara Malaysia for a US$6m loan by foreign financiers and the first defendant, therefore, obtained the balance loan of RM14m from local financiers, as shown in the letters dated 26 September 1983, 18 October 1983 and 26 October 1983. The said letters at p 177-184 set out the background to the two syndicated loans obtained by the first defendant.

(d) The agreements pertaining to the syndicated loans granted to the first defendant financing of the Gambier Project are as follows:

(i) Loan agreement dated 16 September 1983 between the first defendant and Private Investment Company for Asia (PICA) S.A ('PICA S.A'), as Manager and Agent for the lenders of the USD loan ('PICA S.A. loan agreement');

(ii) Letter dated 26 October 1983 from PICA S.A. to the first defendant, duly accepted by the first defendant through the third defendant;

(iii) Supplemental agreement dated 1 November 1983 between first Defendant and PICA S.A as Manager and Agent for the lenders;

(iv) Loan agreement dated 19 March 1984 between the first defendant and PICA (Malaysia) Sdn Bhd ('PICA Malaysia) as Manager and Agent for the lenders ('PICA Malaysia Loan Agreement').

(e) Pursuant thereto, the first defendant was granted a USD6m loan ('the PICA SA Loan') and RM14m loan ('the PICA Malaysia Loan').

(f) Thus, pursuant to the plaintiff's bank guarantee facility and at the request of the first defendant:

(i) The plaintiff had issued bank guarantees ('the bank guarantees') to Elders Pica (Pte) Ltd Singapore (formerly known as PICA S.A) ('Elders PICA') and PICA Malaysia respectively (collectively the 'first defendant's financiers'), particulars of which are as follows:

(a) on 1 November 1983, the plaintiff had issued a bank guarantee in favour of Elders PICA in connection with the PICA S.A. Loan Agreement; and

(b) on 19 March 1984, the plaintiff issued a bank guarantee in favour of PICA Malaysia in connection with the PICA Malaysia Loan Agreement.

(ii) The plaintiff's bank guarantees were issued in the format as required by the first defendant's financiers and this format was agreed to by the first defendant and the third and fourth defendants, as the directors then of the first defendant.

(iii) The first defendant had defaulted in making the necessary payments to the first defendant's financiers under the PICA S.A. Loan and PICA Malaysia Loan and therefore, the first defendant's financiers had issued numerous reminders to the first defendant for payments.

(iv) Since full payment has been made by the plaintiff to the first defendant's financiers, the bank guarantees have been returned to the plaintiff for cancellation.

(v) The amount outstanding and due to be paid by the first defendant to the plaintiff as at 26 November 1986 (pp 519 and 664 CBD) are as follows:

(a) Overdraft Facility RM14,149,979.35 (p 701, CBD Vol 2);

(b) Bank Guarantee Facility RM333,499.33 (p 733, CBD Vol 2);

(c) Total as at 26 November 1986 RM47,884,178.68.

(vi) The first defendant failed to make payments to the plaintiff for the sums outstanding under the aforesaid credit facilities and further failed to make any payment to the plaintiff despite the issuance of the letters of demand by the plaintiff's solicitors to the defendants (pp 412–422, CBD Vol 1).

The Liability of the Guarantors

(i) The second defendant, the brother of the third defendant and also a director of the first defendant at the material time, is only liable under the first guarantee and therefore, is indebted to the plaintiff for the sums outstanding under the overdraft facility;

(ii) The third defendant who is the main person behind the first defendant and who runs the first defendant company and is also a director, is liable under the first and second guarantees. He is, therefore, indebted to the plaintiff for the sums outstanding under the overdraft facility and bank guarantee facility; and

(iii) The fourth defendant, the wife of the third defendant and also a director of the first defendant, is liable under the second guarantee. She is, therefore, indebted to the plaintiff for the sums outstanding under the bank guarantee facility.

(g) The defendants are, therefore, indebted to the plaintiff for the sums as prayed for in the amended statement of claim as at 26 November 1986.

(h) We say the above are the undisputed facts.

As to Defences

(a) It appears from the defences filed that the defendants only appear to dispute generally the following:

(i) That they are not liable for the amounts claimed under the bridging loan as they say the bridging loan was not granted. However, we have shown above that the bridging loan was granted in full and the account was converted to an overdraft account at the first defendant's request.

(ii) That the guarantees were mere formalities as the plaintiff ought to realize the charged lands first. However, the clauses in the guarantees are clear, in that the guarantors' liabilities are as principal debtors and irrespective of any security obtained by the plaintiff. For information the first defendant has been opposing all foreclosure actions and thus such defence is unreal.

(b) *Interest rate/amount due:*

(i) The plaintiff is claiming for interest at the rate of 16.5% per annum above the plaintiff's base lending rate.

(ii) The original interest rate for the bridging loan (now converted to the overdraft) was 15.5% per annum, as prescribed by the first letter of offer and cl 1 of the charge annexure to charge over the first lands and cl 4(a) of charge annexure to charge over the second lands.

(iii) By the second letter of offer the interest rate for the bridging loan (now the overdraft) and the amounts paid under the bank guarantees would be charged at 2% pa above the plaintiff's base lending rate (see also s 3.01 of both charge annexure to charge over first lands and second over second lands.

(iv) However, the plaintiff preserved its rights to vary the interest rate at the bank's discretion under the charges executed by the first defendant, as seen in cl 3, cl 6, s 3.01 and s 3.04.

(v) Notice of the change of interest from 15.5% per annum to 16.5% per annum above the plaintiff's base lending rate (which represented 6% and the plaintiff's base lending rate at that time) was given to the first defendant on 29 November 1986 and to the second to fourth defendants. The defendants had never challenged the interest rates until now.

(vi) It is to be noted that the amounts due are all accumulated under the first defendant's overdraft account.

(vii) The original statement of accounts is seen at page 500–660, CBD Vol 2

(viii) The defendants have always been vague as to their dispute on the interest rates and have never stated what should be the interest sums due. The plaintiff has provided the breakdown for computation of interest

under various scenarios as requested by the defendants during the case management on 13 September 2005. However, the defendants never reverted as to what they say ought to be the correct amounts claimed. The three scenarios are as follows:

(1) Scenario 1 (pp 761–777, 698–708, 731–740 CBD Vol 2) 2% + BLR -> 16.5%, as is reflected in the actual statements of account; or

(2) Scenario 2 (pp 674–685, 709–719, 741–750, CBD Vol 2) 2% + BLR -> 6% + BLR; or

(3) Scenario 3 (pp 777–790, 720–730, 751–760, CBD) 2% + BLR throughout.

(c) *Amount of the outstanding debt:*

(i) The defendants do not at any time give particulars of what the defendants allege should be the actual amount due from the defendants to the plaintiff.

(ii) Since the filing of this writ, the plaintiff has sold some of the charged lands and the proceeds of sale have been credited to the first defendant's account as shown in p 773 CBD, Vol 2

(iii) The first defendant has also made several part-payments to the plaintiff. The part-payments have been credited to the first defendant's account with the plaintiff as shown in pp 528–531, 534–537, 539, 542, 543, 545–548, 550, 551, 553, 556, 557, 566, 629, 635. CBD, Vol 2.

(iv) Based on the detailed statements of accounts in CBD and the plaintiff's claim premised on an interest rate of 16.5% p.a, compounded monthly, the amount outstanding as at 26 November 1986 is as follows:

(1) as against the first and third defendants, the sum of RM47,884,178.68 as at 26 November 1986 with interest thereon at 16.5% per annum on monthly rests basis from 27 November 1986 until full payment (p 761 CBD Vol 2) (being the amount outstanding in respect of both the overdraft facility and bank guarantee facility);

(2) as against the second defendant (who only guaranteed the overdraft), the sum of RM14,149,979.35 as at 26 November 1986 with interest thereon at 16.5% per annum on monthly rests basis from 27 November 1986 until full payment (p 791 CBD Vol 2) (being the amount outstanding under the overdraft facility);

(3) as against the fourth defendant (who only guaranteed the bank guarantee facility), the sum of RM33,734,199.33 as at 26 November 1986 with interest thereon at 16.5% per annum on monthly rests basis from 27 November 1986 until full payment (p 733, CBD Vol 2) (being the amount outstanding under the bank guarantee facility).

(d) *Conclusion*

(i) As shown above, the issues raised by the defendants cannot be supported at law or by any evidence at all and represent mere bald allegations designed

to delay the trial on this matter. However, we reserve the right to address any other issues the defendants may raise in their submissions.

(ii) We are saying that there are no disputes of fact but should the defendants in their submissions choose to deny the facts herein, we pray that My Lord would consider, if deemed fit, to place the defendants on the witness stand to state under oath their disputes.

(iii) However, we say there is no valid defence by the defendants and the plaintiff therefore, seeks for judgment against the defendants for the sums as stated in para 12.4 above with costs.

FINDINGS

[48] Reproduction of the core parts of the main submissions showed the parties strayed from their pleaded case as analysed. Each party maintained their assertions, denials and arguments. Reproduction of their replies and further replies serve only to demonstrate failure to condescend to the issues and particulars as pleaded.

[49] The first dispute on the pleadings is:

Findings A: That First Defendant Was The Plaintiff's Customer Of An Overdraft Facility Of RM10Million And Bank Guarantee Facility Of RM28Million

[50] The documentary evidence showed that the first defendant had applied by a letter dated 1 June 1982 for a fixed loan of RM10m. The plaintiff responded with a letter of offer dated 10 June 1982 for a loan of RM10m at 15.5% per annum for a term of 2½ years inclusive of two years grace period on principal repayment to be secured by a charge on certain properties having a market value of RM38.5m and original continuing unconditional joint and several personal guarantee for RM10m by the second and third defendants, Tan Chong Keat and Tan Chong Phok.

[51] The offer was accepted for the first defendant by the third defendant. The plaintiff had in the letter of offer reserved the right to amend the rate of interest and the terms of the offer at their absolute discretion as and when necessary. The second and third defendants signed their personal guarantee (first letter of guarantee) on 1 July 1982 and the relevant charges were executed on 27 July 1982.

[52] On 25 May 1983, the first defendant applied to the plaintiff for a bank guarantee of US$15m. By their letter of 7 July 1983, the plaintiff approved the application by the first defendant, offering a bridging loan of RM10m and bank guarantee of RM28m expiring 31 December 1986 secured by a first fixed charge of RM10m and supplemental charge of RM28m over the properties and original continuing unconditional joint and several guarantee for RM38m executed by the second and third defendants. Interest on the bridging loan was to be 2% above the plaintiff's base lending rate or 2% above three or six months' cost of funds, whichever is higher and a Commission at 1/8% per month in accordance with the standard rate of Association of Banks in Malaysia was charged on the bank guarantee.

[53] The offer was accepted for the first defendant by the third defendant. As before, a certified copy of a circular resolution was issued by the third defendant.

[54] The charges were signed on 28 October 1983 for bank guarantee and banking facilities to the principal limit of RM30m. Clause 4.02 of the supplemental charges provide:

> The charger hereby declares that other than a first charge (the 'bridging loan charge') in favour of the bank registered as charge-presentation No 10464/02 Jilid 743 Folio 140, there is no other charge or encumbrance on the lands and.....

[55] The charges that were signed for the RM30m in banking facilities, defined as bank guarantee and other banking facilities are clearly second charges and the first charge, being for the original RM10m in bridging loan facilities was maintained.

[56] The court finds there was a first charge signed 27 July 1982 by the first defendant to the plaintiff for a RM10m bridging loan which was converted upon an application made on 8 September 1983 and subsequently approved; and a second charge signed on 28 October 1983 for RM30m in banking facilities for bank guarantee and other facilities.

[57] If an effort were made to present the chronology systematically in the statement of the facts, and the solicitors for the defendants were less absorbed with argument exploiting the less than systematic presentation and the parties concentrated upon ascertaining the facts, they would find the issue of fact in this paragraph a simple disputed fact that can be resolved quickly by inspection of the documents.

Findings B: That The Second, Third And Fourth Defendants Were Guarantors Of The First Derendant; And

Findings C: That By 1 July 1982 Letter Of Guarantee, Second And Third Defendants Guaranteed Payment Of The Overdraft Facility Granted To The First Defendant

[58] The documentary evidence shown and the court so finds that the second and third defendants signed the first guarantee on 1 July 1982 for a RM10m bridging loan facility and the third and fourth defendants signed the second guarantee on 25 October 1983 for up to RM30m banking facilities for a bank guarantee and other banking facilities.

[59] The second defendant had signed as a guarantor for a bridging loan facility. He had resigned on 1 July 1983. On 7 July 1983, a second letter of offer was issued in response to an application by the first defendant made on 25 May 1983. Clause 8(f) on the said second letter of offer dated 7 July 1983 states as follows:

> This letter of offer if accepted will cancel and supersede the letter of offer dated 10th June 1982 issued by our Butterworth Branch for bridging loan of $10.0m.

[60] The plaintiff in the said letter of offer dated 7 July 1983, required the second defendant to guarantee the second facility. This is consistent with the replacement of the first letter of offer with the second letter of offer. It also explains why the plaintiff agreed to the fourth defendant to replace the second defendant as a guarantor.

[61] The documentary evidence also show that prior to this date, by a letter produced at CBD Jilid 1 p 111 dated 29 July 1983 to the first defendant, the plaintiff agreed to accept Khaw Siew Suan as a guarantor in place of Tan Chong Phok, and:

> The banking facilities totalling $38m are therefore to be guaranteed jointly and severally by Tan Chong Keat and Khaw Siew Suan in their personal capacities. All other terms and conditions governing the banking facilities in accordance with the aforesaid letter of offer remain unchanged. The above terms and conditions form part of the letter of offer and are to be treated as coherent to the same for all intents and purposes.

[62] On 8 September 1983, the first defendant under the hand of the third defendant applied to convert the bridging loan of RM10m into an overdraft facility, setting out the reasons as follows:

(a) The period of draw down imposed by the offshore bankers is limited to only six months and under such conditions, we have to draw down the whole amount within six months period and thereby creating ample surplus for our requirement. With this conversion, it will enable us to reduce our interests cost.

(b) A commitment fee will also be charged by the offshore bankers for the undrawn portion of the loan and this will constitute an extra burden in our financial costs.

(c) As all the disbursements from the offshore banks will be to your account, it will be prudent for us to reduce the balance with you for a short period of time pending utilising the funds for our development.

[63] Although the copy of the letter at CBD Jilid 1 p 111 does not show any signature upon the duplicates as signification of acceptance of that consequential amendment to the letter of offer dated 7 July 1983, it is clear by virtue of the fact that the third and fourth defendants signed the second guarantee, that the first, third and fourth defendants accepted the terms in that letter.

[64] Upon acceptance of the offer of 7 July 1983, the original offer was cancelled and superseded. The facilities extended under the first letter of offer, therefore, ceased to exist under the terms of that first letter of offer. The sums advanced under the facilities under the first letter of offer became part of the facilities and pursuant to the terms and conditions under the second letter of offer.

[65] Since the facilities under the first letter of guarantee signed by the second and third defendants as sureties had become part of the facilities under the second letter of offer, the issue arises whether the sureties remained liable after acceptance of the second letter of offer.

[66] A related question submitted upon was what is the effect of the conversion of the bridging loan facility to an overdraft facility. **A**

[67] A bridging loan is drawn down and in due course is repaid and the outstanding sum might only increase because of unpaid interest and penalties. An overdraft facility is more flexible. The outstanding sum could fluctuate as amounts are repaid and new draw down made. The flexibility is the reason for the application to convert to an overdraft facility. The second guarantor faced a potentially greater risk under the overdraft facility than expected in the first place when he guaranteed the bridging loan. The obvious question is did he agree to undertake such increased risk. **B**

C

[68] Section 86 of the Contracts Act 1950 was relied upon by the second defendant. Guarantors are defined in s 79 as sureties, the party guaranteed is the creditor and the borrower is the principal debtor. Section 86 provides:

> Any variance, made without the surety's consent, in terms of the contract between the principal debtor and the creditor, discharges the surety as to transactions subsequent to the variance. **D**

[69] There is no evidence of consent by the second defendant. It is not disputed the variance is at the first defendant's request. Applying s 86, the second defendant cannot be held liable under the first guarantee after the bridging loan was converted to an overdraft facility without his consent being sought. Since there is no defined claim of liability arising before the conversion to an overdraft facility, the claim against the second defendant must, therefore, be dismissed on that ground. **E**

[70] The third defendant, who signed the letter dated 8 September 1983 for the first defendant which sought the conversion of the bridging loan to an overdraft facility, cannot now say he did not give any consent. He is deemed to have consented when he signed the request. He is estopped from denying his consent. The third defendant remains liable under the first letter of guarantee as well as under the second letter of guarantee but since he is liable under the second guarantee, the first guarantee is irrelevant. **F** **G**

Findings D: That By 25 October 1983 Letter Of Guarantee The Third And Fourth Defendants Guaranteed Patment Of Bank Guarantee Facility Together With Interest Thereon. **H**

[71] By the letter of guarantee dated 28 October 1983, the third and fourth defendants undertook as follows:

> DO HEREBY JOINTLY AND SEVERALLY GUARANTEE to you the repayment and payment by the Borrower on demand by you of the outstanding principal amount of the facilities together with all interest, costs, commission and other banking charges and expenses which charge against the borrower and all costs, charges including legal charges and expenses which you may incur in enforcing or obtaining repayment and payment of all sums of money due to you from the 'Borrower either alone or jointly with others AND WE THE GUARANTORS DO ALSO HEREBY AGREE with you as follows:... **I**

[72] The term 'the facilities' was used as follows:

> IN CONSIDERATION of your having agreed at our request to grant to LUM CHOON REALTY SDN BHD, a company incorporated in Malaysia and having its registered office at No 48 - Northam Road, Penang (hereinafter referred to as 'the Borrower' bank guarantee and other banking facilities up to the sum of $30,000,000/- (Ringgit Thirty million) (hereinafter called 'the Facilities'), WE, THE UNDERSIGNSD, NAMELY:
>
> (a) TAN CHONG KEAT (I.C. No. 3643663) of No. 8G, Jalan Bunga Pudak, Tanjung Bungah, Penang and
>
> (b) KHAW SIEW SUAN (I.C. No. 0947898) of No. 3P, Medan Lembah Permai, Tanjung Bungah, Penang....

[73] The documentary evidence shows that the third and the fourth defendants did sign the second guarantee dated 25 October 1983.

[74] It is clear from the foregoing that the position taken by the first, third and fourth defendants as summarised earlier above is wholly lacking in merit, not only unsupported by but is also contrary to the evidence.

Findings E: Plaintiff Had Issued 1 November 1983 Bank Guarantee Of US$6 Million And 19 March 1984 Bank Gaurantee For RM14 Million

[75] The objection taken by the first, third and fourth defendants was that the approval was for a bank guarantee to guarantee 'the repayment of US$12.0m offshore loan to be obtained by you, Lum Choon Realty Sdn Bhd for the purpose of financing your housing project known as Toman Bukit Gambier, Penang; and also contained other terms and conditions to be fulfilled by the first defendant before utilisation of facilities, when in point of fact none of the matters averred to in this part of the statement of claim are covered by the alleged 'bank guarantee facility'. The first, third and fourth defendants also raised a question of law whether the defendants are not liable in respect of the matters set out herein as they bear no relation to the agreed terms of the letter of offer dated 7 July 1983.

[76] Given that what was pleaded was 'that pursuant to the bank guarantee facility the plaintiff had on the 1 November 1983 issued a bank guarantee for the sum of US$6m to Elders Pica (PTE) Limited Singapore (formerly known as Private Investment Company for Asia (PICA) SA) as agent for Bank of America National Trust Saving Association, Indian Bank, Westpac Banking Corporation and Private Investment Company for Asia (PICA) SA ('the off-shore loan lenders') and had on the 19 March 1984 issued a bank guarantee for the sum of RM14m to PICA (Malaysia) Sdn Bhd as agent for Aseambankers Malaysia Berhad, Bank of America, National Trust & Saving Association and D & C Nomura Merchant Bankers Berhad ('the Domestic Loan Lenders'), the response by the third and fourth defendants did not dispute the correctness of the facts pleaded but dealt with a different issue. It is also not disputed by the first defendant.

[77] The court, therefore, concludes that the facts as asserted by the plaintiff in this part of the pleadings is not disputed by the first, third and fourth defendants as to the truth of the particulars of facts therein.

[78] The only issue raised is whether the guarantees bind the guarantors where:

(a) the maximum amount of coverage exceeds that approved in the letter of offer;

(b) other terms differ from that in the letter of offer.

[79] This issue was not dealt with in the submissions by counsel and are considered as abandoned.

Findings F: Plaintiff's Claim Against The First Defendant

[80] The plaintiff's claim against the first defendant, Lum Choon Realty Sdn Bhd is for the sum of RM47,884,178.68 due and owing to the plaintiff as at 26 No1986 together with interest thereon at the rate of 16.5% per annum on monthly rests basis from the 27 November 1986 until full payment. The defendant disputed on the basis the interest rate levied is not the contractual rate of interest. There is no dispute on the principal amount. The objection on the interest rate holds no merit since the agreement provided the plaintiff with rights to vary the rate of interest.

[81] The plaintiff's claim against the first defendant is for the sum of RM47,884,178.68 due and owing to the plaintiff as at 26 November 1986 together with interest thereon at the rate of 16.5% per annum on monthly rests basis from 27 November 1986 until full payment is, therefore, allowed.

Findings G: Plaintiff's Claim Against The Second Aand Third Defendants

[82] The plaintiff's claim against the second and third defendants, Tan Chong Phok and Tan Chong Keat respectively, as guarantors under the first letter of guarantee the sum of RM14,149,979.35 due and owing to the plaintiff as at 26 November 1986 together with interest thereon at the rate of 16.5% per annum on monthly rest basis from 27 November 1986 until full payment.

[83] The plaintiff's claim against the second defendant is dismissed for the reason given earlier above.

[84] For the third defendant it was argued the sum is incorrect. The objection is dismissed for the reason above.

Findings H: Plaintiff's Claim Against The Third Aand Fourth Defendants

[85] The plaintiff's letter dated 29 July 1983 evidences agreement to accept Khaw Siew Suan as a guarantor in place of Tan Chong Phok. While in some dim interstices

of the corporate mind there might be the thought, as is now advanced to the court, that the letter referred to the additional facility of RM28m in bank guarantee facilities, the second paragraph of the 29 July 1983 letter stating that the banking facilities totalling RM38m are therefore to be guaranteed jointly and severally by Tan Chong Keat and Khaw Siew Suan in their personal capacities. All other terms and conditions governing the banking facilities in accordance with the aforesaid letter of offer remain unchanged. The above terms and conditions form part of the letter of offer and are to be treated as coherent to the same for all intents and purposes, is consistent with the language of the letter of offer of 7 July 1983 that set out the sum RM38m of banking facilities encompassing RM10m in term loan and RM28m in bank guarantee facilities.

[86] On the basis of the letter dated 29 July 1983, there can be two interpretations. Either

(a) The second defendant is entirely replaced by the fourth defendant for the whole of RM38m in facilities, or

(b) The second defendant is replaced by the fourth defendant only in respect of the RM28m in bank guarantee facilities.

[87] A question of law or interpretation need not be pleaded so long as the facts relied upon in the question have been pleaded. That an issue has not been pleaded is sustainable as an objection only because the other party did not have the opportunity of verifying the facts relied upon as to whether they are correct or not. Where the facts relied upon have already been pleaded, there is no injustice in allowing an issue, whether of law or of inferences, findings or conclusions of fact or interpretation to be submitted upon. In this case, there is no reason shown why the issue cannot be submitted upon.

[88] Even though acceptance of the terms of a letter of offer created an agreement upon its acceptance, it was implicit that there would be written agreements and guarantees to be executed. The fact of acceptance of the letter of offer does not prevent one party from proposing new terms to the other or for the other to accept it. When the agreements and guarantees were signed with terms that differed from the letter of offer, the new terms were accepted, and the previous agreement from the acceptance of the letter of offer were superseded.

[89] The better indicator of what was intended, understood and acted upon by the plaintiff, the third and fourth defendants would be the terms of the letter of offer, the letter approving the fourth defendant as a surety, the letter of guarantee signed by the third and fourth defendants, rather than what interpretation any of the parties may, after the commencement of these proceedings, prefer, advance and maintain to their advantage. In this regard originally it was the second defendant who was to sign the second guarantee for RM38m. In allowing replacement of the second defendant with

the fourth defendant the letter from the plaintiff stated clearly the banking facilities totalling RM38m are therefore to be guaranteed jointly and severally by Tan Chong Keat and Khaw Siew Suan in their personal capacities. Subsequently the fourth defendant signed a guarantee for RM38m. At no time was distinction made between the original RM10m facility and the additional RM28m facility as affects the second and fourth defendants.

[90] The objections by the third and fourth defendants must, therefore, fail.

[91] The court, therefore, ordered that:

(a) Judgment is entered against first defendant sum RM47,884,178.68 as at 26 November 1986 + interest @ 16.5% monthly rests from 27 November 1986 to full settlement with costs.

(b) Claim against second and third defendants under first letter of guarantee dismissed with costs.

(c) Judgment is entered against the third and fourth defendants under second letter of guarantee in the sum of RM33,734,195.33 as at 26 November 1986 with interest thereon at 16/5% from 27 November 1986 to full settlement with costs.

(d) Judgment is entered against third defendant under the second guarantee in the sum of RM14,149,797.35 as at 26 November 1986 with interest thereon at 16.5% from 27 November 1986 to full settlement with costs.

[92] Upon decision being given, Dato' Mahinder Singh Dulku, counsel for the defendants applied for a stay of execution upon the grounds there is a proceeding before the Registrar for assessment of damages in a substantial claim against the plaintiff where the sum is about equal to the sum in this judgment. This was disputed by SM Yoong, counsel for the plaintiff. Counsel informed the court that they dispute the claim, maintaining there was no damage and the proceedings would take some time. She submitted the application should be made formally.

[93] Since the facts relied upon were disputed, a formal application is necessary so that the facts relied upon could be verified. The court ordered that the application for a stay of execution be made formally. An application was duly filed under encl 241.

[94] The law on a stay of execution is well trodden. Special circumstances must be shown. The main special circumstances is that the appeal if successful will be rendered nugatory. The circumstances must relate to the enforcement of the judgment and not the normal effect of the enforcement of a judgment, such as hardship arising from the enforcement thereof, or revisit or reopen the grounds that were raised or could have been raised and dealt with in the trial. It must also be borne in mind this action was commenced in 1986 and the judgment has been given after

A a full trial. The defendants have failed to discharge the onus that it is upon them to show special circumstances and their application was accordingly dismissed.

Application dismissed.

B Reported by K Krishnan

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